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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MAXLYN CADLO, **Plaintiff and Respondent,** **v.** **METALCLAD INSULATION CORPORATION,** **Defendant and Appellant.**	**A111353** **(San Francisco County Super. Ct. No. CGC-02-412325)**
MAXLYN CADLO, **Plaintiff and Respondent,** **v.** **JOHN CRANE INC.,** **Defendant and Appellant.**	**A112002** **(San Francisco County Super. Ct. No. CGG-02-412325)**

Two days after a jury verdict in his favor in his asbestos-related personal injury action against defendants Metalclad Insulation Company (Metalclad) and John Crane Inc. (Crane),[1] Anthony Cadlo (Cadlo) died. Judgment was entered on April 4, 2005, more than one week after his death, on behalf of his widow Maxlyn Cadlo (Maxlyn Cadlo), individually and as successor in interest to her husband.[2] Subsequently, the trial court

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* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, parts I.A.3., I.A.4., I.B., II. and III. of this opinion are not certified for publication.

1 Metalclad and Crane are referred to collectively as defendants.

2 Cadlo and Maxlyn Cadlo are referred to collectively as plaintiffs.

vacated that judgment and, nunc pro tunc, entered a retroactive judgment to March 23, 2005, the day after the verdict and one day before Cadlo died. In that judgment, the court award included damages for future economic loss and for pain and suffering. Defendants appeal that judgment.[3] They each challenge the inclusion of these damages as contrary to Code of Civil Procedure section 377.34. They also argue that expert witness fees and prejudgment interest should not have been awarded. In addition, Metalclad contends insufficient evidence was presented that Cadlo was exposed to Metalclad's asbestos-containing materials, and Crane contends the court committed instructional error and erred in allocating pretrial settlements to Maxlyn Cadlo's loss of consortium claim. In the published portion of this opinion we reject the attack on the future and noneconomic damages. In the unpublished portion, we reject defendants' remaining contentions.

BACKGROUND

Cadlo's Testimony

Cadlo, born in 1944, served in the United States Navy on board the USS Black as a machinist mate from January 1965 until his June 1968 discharge. During that service, Cadlo was involved in the removal of asbestos-containing pipe insulation and valve insulation pads. On one occasion, between 1965 and 1968, the USS Black was dry docked for two and one-half months at the Long Beach Naval Shipyard (LBNS) for a major overhaul, including the removal of old asbestos insulation. During this overhaul, shipyard insulators tore out and replaced insulation. Cadlo said that when the workers used saws to cut the lagging off piping and equipment it "look[ed] like a snowstorm."

On two other occasions, the USS Black was at the LBNS for about a week. No major repairs or work was performed on these occasions. Cadlo was also assigned to the ship's engine room during a shorter overhaul, which included insulation removal, at a naval shipyard in Sasebo, Japan. Cadlo could not remember the names of any of the

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[3] On our own motion and by an order separately filed, we have consolidated the two appeals.

manufacturers or suppliers of the packing, gasket and thermal insulation materials he worked around on the USS Black.

Cadlo also testified that while on board the USS Black he worked on valves and pumps, which involved removal of valve and pump packing and insulation. In his responses to requests for admission, he stated that he worked with Crane's products during his Navy service. Crane manufactured and supplied asbestos-containing pump and valve packing material and gasket material, and concedes that Cadlo was exposed to its asbestos-containing products.

Ay's Testimony

Charles Ay served as an "asbestos worker insulator" at the LBNS between April 1960 and September 1981, and worked aboard ships installing insulation materials and performing pipefitting work. As an insulator he worked with all of the thermal insulation materials used at the LBNS. The materials containing asbestos included pipe insulation, block insulation, insulating mud, and cloth. On multiple occasions in the 1960's, Ay worked on the USS Black when it was at the LBNS, including when it was there for an overhaul in the mid-1960's. In 1965, Ay spent 80 percent of his time on ship and 20 percent off ship.

During the 1960's, the General Services Administration (GSA) had contracts with various companies to supply insulation materials to the LBNS upon request. The GSA was the largest supplier of insulation material to the LBNS, and this product originated from Pabco, Owens Corning, Johns-Manville, Armstrong, GAF Rubberoid, and Philip Carey. Outside vendors also supplied insulation materials to the LBNS. These outside vendors, also referred to as contractor-suppliers, were Metalclad, Thorpe Insulation (Thorpe), Fenco, and Armstrong Contracting and Supply (ACandS). Metalclad supplied Pabco and Kaylo, Thorpe supplied Johns-Manville, and Fenco and ACandS supplied Kaylo. Daily, Ay would see the outside vendors' trucks in the shipyard dumping material. Two or three times a week Metalclad would deliver its material in pickup trucks and "box trucks" to two LBNS storage buildings or a ship pier. Metalclad and Thorpe supplied pipe covering, block, cloth, and mud. In the early and mid-1960's,

Metalclad supplied Pabco and Kaylo insulation and Pabco mud to the LBNS. Based on observing trucks coming into the LBNS, Ay said that Thorpe was the largest outside vendor of insulation materials to the LBNS, followed by Metalclad. Fenco and ACandS were each "very small" suppliers. The insulation materials from the various vendors were "completely interchangeable" and placed in a common supply warehouse.

Ay did not know how much insulation supplied to the LBNS in 1960, 1965, and 1967 came from Metalclad. But he said Metalclad was there "continuously to deliver a voluminous amount of material," to be used on a daily basis. Ay also did not know how much insulation either by quantity or percentage was supplied by Metalclad, Thorpe, Fenco or ACandS to the LBNS in the 1960's. Ay never saw a Metalclad truck unload any material onto the USS Black or any other ship and did not recall seeing Metalclad products used aboard the USS Black or any specific ship.

Ay testified that the GSA insulation materials were almost always delivered to the LBNS by railroad boxcars. The material would be off-loaded onto pallets that were taken by forklift to the warehouse. Annually, the GSA delivered more insulation material to the LBNS than did Metalclad. Ay did not know if Metalclad supplied insulation materials to the GSA.

Ay said that, in the 1960's, Metalclad supplied asbestos insulation to and performed insulation contract work on ships at the LBNS, but Thorpe, Fenco, and ACandS did not.

Borkowski's Testimony

Allen Borkowski's deposition testimony established that he served on board the USS Black between 1964 and 1967, and recalled installing Kaylo brand pipe covering and block insulation on that ship on approximately six or eight occasions.

Trueblood's Testimony

Metalclad employee Donald Trueblood testified that between 1933 and 1973 Metalclad was involved in the installation and sale of asbestos-containing insulation materials. In late 1967, Metalclad began selling Pabco brand calcium silicate insulation. Prior to that time, Metalclad sold Kaylo brand insulation.

The Verdict

In its special verdict, the jury found that defendants were negligent, defendants' asbestos-containing products were defective in design, defendants failed to provide adequate warnings for their products and defendants' negligence, design defects, and failure to warn were legal causes of Cadlo's injury. It also found in favor of Maxlyn Cadlo on her loss of consortium claim. It awarded Cadlo $87,304.74 in past medical expenses, $174,000 in future medical expenses, $1,412,400 in nonmedical economic damages, and $4 million in noneconomic damages. It awarded Maxlyn Cadlo $3 million in loss of consortium damages. The jury apportioned 3 percent of fault for plaintiffs' injuries to Crane and 4 percent of fault to Metalclad.

I. JOINT ISSUES IN THE TWO APPEALS

A. *The Damages Awarded in the Judgment were Proper*

On March 22, 2005, the jury rendered its verdict in favor of plaintiffs, and the court ordered plaintiffs' counsel to prepare and submit an agreed form of judgment. Cadlo died on March 24, but plaintiffs' counsel was not informed of the death until several days later. On March 25, the court signed an interim judgment.[4] The court entered the judgment on special verdict on April 4, 2005. The judgment stated, in relevant part: "The economic damages set forth above will be reduced by offsets for prior settlements and other payments or credits allowed by law, if any. Said reductions as well as plaintiffs' entitlement to ordinary and expert costs and prejudgment interest, if any, shall be determined by the court in subsequent proceedings."

On June 7, 2005, Maxlyn Cadlo filed a declaration pursuant to Code of Civil Procedure section 377.32[5] to permit her to continue and/or commence any and all actions related to Cadlo's asbestos exposure that survive his death.

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[4] The March 25, *2004* handwritten date on the judgment appears to be merely a clerical error since the judgment expressly states that trial commenced on January 20, 2005.

[5] All undesignated section references are to the Code of Civil Procedure.

On July 20, 2005, Maxlyn Cadlo filed a motion "for an order determining the application of Proposition 51 [(Civ. Code, § 1431.2)] and allocation of pretrial settlements so as to finalize judgment in this matter."

On July 28, 2005, Metalclad filed a motion pursuant to section 663[6] to partially vacate the judgment and enter a different judgment. Metalclad relied on section 377.34 to argue that because Cadlo had died before the April 4 entry of judgment, the judgment improperly included an award to Cadlo of $4 million in noneconomic damages, $174,000 in future medical damages, and future economic damages[7] that must be stricken from the judgment.[8]

On August 12, 2005, Maxlyn Cadlo filed a motion to vacate the prior judgment and enter a new antedated judgment nunc pro tunc to March 22, pursuant to section 664 "so as to ensure that plaintiffs retain 'the legitimate fruits' of this litigation and avoid a patent injustice." Both defendants opposed this motion.

On September 6, 2005, the court granted Maxlyn Cadlo's motion to vacate the prior judgment and entered a new antedated judgment nunc pro tunc to March 23, 2005.

On September 19, 2005, the court granted Maxlyn Cadlo's motion regarding application of Proposition 51 and allocation of pretrial settlements. The court ruled that after offsets against economic damages, the net economic damage award was $1,362,842.11, for which Metalclad and Crane were jointly and severally liable. The

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6 Pursuant to section 663, a trial court retains jurisdiction to consider and grant a motion to vacate a judgment and enter a different judgment to correct an incorrect or erroneous legal basis for decision, not consistent with or supported by the facts, or a judgment not consistent with or not supported by the special verdict. (*Craven v. Crout* (1985) 163 Cal.App.3d 779, 782-783.)

7 Metalclad noted that the jury awarded Cadlo $1,412,400 in economic damages without specifying what portion accounted for past economic damages and what portion accounted for future economic damages.

8 Metalclad also opposed Maxlyn Cadlo's motion regarding application of Proposition 51 and allocation of pretrial settlements, arguing, in part, that given the dispute as to whether Cadlo was entitled to recover future and noneconomic damages, it was premature to calculate the offset ratio. Metalclad and Crane also challenged the motion on the merits.

order stated that the court would "retain continuing jurisdiction to ensure defendants receive a similar offset from any future settlement monies received in satisfaction of this . . . action" and "[t]his order is hereby made part of and incorporated in the judgment that was entered nunc pro tunc by this court on September 6, 2005."

On appeal Metalclad and Crane contend the court erred in awarding Maxlyn Cadlo damages for future economic loss and for pain and suffering since Cadlo died before entry of the original judgment. Resolution of this issue requires an evaluation of the interaction of sections 377.34, 664, and 669.

1. *The Legal Framework*

(a) *The Relevant Statutes*

Section 377.34 provides: "In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering or disfigurement." Though worded in the affirmative, this section effectively imposes a limit on the types of recoverable damages when the plaintiff dies before judgment. (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 298-303 (*Sullivan*).)

Section 664 provides in relevant part: "When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict within 24 hours after the rendition of the verdict, whether or not a motion for judgment notwithstanding the verdict be pending, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings."

Section 669 provides in relevant part: "If a party dies after . . . a verdict upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon."

Section 664 is directory rather than mandatory (*Churchill v. Louie* (1902) 135 Cal. 608, 612; *Shapiro v. Equitable Life Assur. Soc.* (1946) 76 Cal.App.2d 75, 99); and, pursuant to sections 664 and 669, the court could properly enter a judgment though Cadlo

had died. The parties differ on the applicability of section 337.34, and whether its limitation on damages prevails over the court's inherent power to enter an amended antedated judgment nunc pro tunc to a date prior to that death. Metalclad and Crane rely on two cases to argue that the amended judgment was improperly entered because section 337.34 creates a bright-line rule that barred the trial court from awarding the challenged damages: *Williamson v. Plant Insulation Co.* (1994) 23 Cal.App.4th 1406 (*Williamson*) and *Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397 (*Kellogg*). An examination of these cases and *Sullivan* leads us to the opposite conclusion.

(b) *Williamson*

In *Williamson*, in the first phase of a bifurcated jury trial conducted in 1991, the jury found that asbestos exposure was a legal cause of the plaintiff's loss, and he was entitled to economic and noneconomic damages. (*Williamson, supra,* 23 Cal.App.4th at p. 1412.) The plaintiff died during the second phase, where liability and comparative fault were tried; but, the trial continued and the jury found the defendant liable. The trial court entered judgment nunc pro tunc as of the day before the plaintiff's death and included noneconomic damages in the judgment. (*Id.* at pp. 1412-1413.)

Division Three of this court reversed, concluding that, in 1991, neither the common law power to enter judgments nunc pro tunc nor section 669 permitted the trial court to enter the antedated judgment. (*Williamson, supra,* 23 Cal.App.4th at pp. 1414-1415.) The court reasoned that at the time of the plaintiff's death the case was not ready for rendition of judgment since the evidentiary stage of the trial had not been completed, the jury had not been instructed, the attorneys had not argued and there was no verdict upon which judgment could be entered. (*Id.* at pp. 1415-1416.) Because the trial court had no authority to enter the antedated judgment, former Probate Code section 573, subdivision (c) (hereafter former section 573(c)) barred recovery of the noneconomic damages awarded by the jury.[9] (*Williamson*, at p. 1414.)

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[9] In 1991, former section 573(c) provided: "Where a person having a cause of action dies before judgment, the damages recoverable by his or her personal representative are limited to the loss or damage the decedent sustained or incurred prior to death, including

Recognizing that former section 573(c) could appear arbitrary,[10] *Williamson* stated, "a line must be drawn if [former] section 573(c) is to have any effect at all, and in that section, the Legislature drew a clear line: noneconomic damages do not survive if the plaintiff dies before judgment. The cases on nunc pro tunc entry of judgment push that line back a short distance, to the time when judgment *could* have been rendered even if it was not. That movement rests on a sound rationale—that a party should not suffer from the court's own delay in giving judgment—and it would be neither wise nor within our authority to erase the line thus drawn." (*Williamson, supra,* 23 Cal.App.4th at p. 1417, fn. omitted.) The court reversed the award of noneconomic damages to the plaintiff's estate.[11]

(c) *Kellogg*

In *Kellogg*, testimony was completed in a bench trial after which the parties argued and the matter was submitted " 'subject to [further] argument.' " (*Kellogg, supra,* 41 Cal.App.4th at pp. 1401-1402.) Approximately two weeks later the parties argued and the matter was finally submitted. Five days later, on August 14, 1988, the plaintiff died. On April 6, 1990, judgment in favor of the plaintiff was entered, which included an award of damages for plaintiff's pain and suffering. (*Id.* at p. 1402.) On appeal, the defendant, in reliance on former section 573(c), argued that since the plaintiff died before final judgment, the judgment could not include an award of damages for plaintiff's pain

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any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived but not including any damages for pain, suffering, or disfigurement." (Stats.1987, ch. 923, § 35.5, p. 2982, eff. July 1, 1988.)

[10] The court recognized that such arbitrariness could be advantageous to a plaintiff who received a large pain and suffering award and died the day after entry of judgment. In that instance, the award is passed on to the plaintiff's estate even though the estate did not endure the pain and suffering. (*Williamson, supra,* 23 Cal.App.4th at p. 1417, fn. 3.)

[11] Since the record in *Williamson* did not reveal the amount, if any, the jury awarded for future economic damages, or what portion of damages was suffered before the plaintiff's death, the Court of appeal reversed the award of economic damages and remanded for trial thereon.

and suffering. In reliance on section 669, plaintiffs argued the damages were properly awarded. (*Kellogg*, at p. 1404.)

Division Four of this court held that pursuant to section 669, the trial court properly rendered judgment because the plaintiff died after trial and submission of the case. (*Kellogg*, *supra,* 41 Cal.App.4th at p. 1404.) However, the plaintiff's death occurred before that judgment was rendered; and, at no time did the *Kellogg* plaintiffs request the trial court to exercise its authority to issue a judgment nunc pro tunc. (*Id.* at pp. 1405, 1406, fn. 8.) *Kellogg* held that since the plaintiff died before judgment, former section 573(c) prohibited the trial court from awarding noneconomic damages for the plaintiff's pain and suffering. (*Kellog,* at p. 1407.)[12]

(d) *Sullivan*

In *Sullivan,* the plaintiff had been awarded a judgment for money damages that included pain and suffering, but the plaintiff died during the pendency of the appeal. The court concluded the damages limitation of Code of Civil Procedure section 377.34 did not apply in this context. (*Sullivan*, *supra,* 15 Cal.4th at pp. 291-292.) Its analysis rested, in part, on section 377.34's predecessor statute, former Probate Code section 573(c), that had imposed the identical damages limitation " '[w]here a person having a cause of action dies before judgment.' " (*Sullivan*, at p. 302.) Because the California Law Revision Commission, which drafted section 377.34, explained that " 'Section 377.34 restates former . . . Section 573(c) *without substantive change*' " (*Sullivan*, at p. 301), the Supreme Court interpreted section 377.34 to apply "only when the person entitled to maintain the action died 'before judgment' " (*Sullivan*, at p. 303). The court then construed the phrase "before judgment" to mean "before rendition of a judgment that is final in the fundamental sense that it leaves no issue to be determined between the parties except the fact of compliance." (*Id.* at pp. 304-305.) "Finality in this sense not only

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12 The entire damage award was reversed because based on the record before it, the Court of Appeal could not determine the amount of economic damages awarded and what amount, if any was awarded for future economic losses. (*Kellogg*, *supra*, 41 Cal.App.4th at pp. 1407-1408.)

makes a judicial determination a judgment, it also makes that judgment appealable." (*Id.* at p. 304.)

2. *Section 377.34 Does Not Limit Damages in this Matter*

As explained in *Sullivan*, section 377.34 prohibits the recovery of certain damages in an action brought or maintained on behalf of a plaintiff who dies before judgment. (*Sullivan, supra,* 15 Cal.4th at pp. 291-292.) Metalclad contends that even if the court was authorized to enter the antedated judgment, section 377.34 imposed a limitation on the types of damages awardable. We disagree. When a court *validly* exercises its discretion to issue a judgment nunc pro tunc, the date of *that* judgment determines whether section 377.34 bars recovery. A contrary result would be illogical. The authority to issue such a judgment is rooted in the goal of avoiding injustice (*Williamson, supra,* 23 Cal.App.4th at p. 1415, and cases cited therein), and, if properly exercised, creates the only judgment in the proceeding that could test the applicability of section 377.34. Moreover, nothing in *Williamson* and *Kellogg* undermines this conclusion.

In *Kellogg*, plaintiffs never sought and the court never issued a judgment retroactive to a date prior to the plaintiff's death. (*Kellogg, supra,* 41 Cal.App.4th at p. 1406, fn. 8.) Thus, the only judgment rendered by the trial court *followed* plaintiff's demise, and the damages limitation of section 377.34 applied. In *Williamson*, the trial court did issue a retroactive judgment to a date prior to the plaintiff's death, but the appellate court concluded there was no authority to do so. (*Williamson, supra,* 23 Cal.App.4th at pp. 1415-1416.) As in *Kellogg*, the only valid judgment in *Williamson* followed the decedent's demise and section 377.34 applied.

Finally, dictum in *Williamson* confirms that entry of a valid nunc pro tunc judgment to a date prior to a claimant's death is immune to the damages limitation in Code of Civil Procedure section 377.34. *Williamson* explained that the predecessor statute, former Probate Code section 573(c), "drew a clear line: noneconomic damages do not survive if the plaintiff dies before judgment." (*Williamson, supra,* 23 Cal.App.4th at p. 1417, fn. omitted.) However, *Williamson* continued, "The cases on nunc pro tunc entry of judgment push that line back a short distance, to the time when judgment *could*

have been rendered even if it was not." (*Ibid*.) Thus, *Williamson* assumed that a valid, nunc pro tunc backdating of a judgment would preserve a plaintiff's claims for damages against the damages limitation now contained in section 377.34.

Crane next relies on *Sullivan* to argue that the court abused its discretion because, at the time Cadlo died, certain posttrial motions remained unresolved. Since no judgment could have been entered, the argument runs, *Williamson* requires us to reverse. Crane is wrong.

Certainly, the court may not rely on either section 669 or the court's common law power to issue nunc pro tunc judgments to antedate a judgment to a date before the judgment could validly have been entered. (*Williamson,* 23 Cal.App.4th at pp. 1414-1417; accord, *Kellogg, supra,* 41 Cal.App.4th at pp. 1405-1407.) "The policy behind section 669 was that if the parties had done everything they could to put the case in a posture where it was ready for final rendition of judgment, a court delay should not be used to prejudice the parties. [Citations.]" (*Kellogg*, at pp. 1404-1405.) Despite Crane's argument to the contrary, *Sullivan* confirms that the court properly exercised its authority to issue a retroactive judgment here.

Unlike in *Williamson* and *Kellogg*, at the time of Cadlo's death, the special verdict had been filed and nothing was left to be done except to commit the verdict to a judgment signed by the court and entered. Crane, though not Metalclad, argues that the court "could not have heard and decided the posttrial motions contemplated by both sides and rendered a final judgment in the two days between the verdict and [Cadlo's] passing." This contention misses the point. Even without resolution of these posttrial motions, following the jury's verdict and before Cadlo's death the case was in a posture that a final, appealable judgment could have been entered. And an appealable judgment entered before the claimant's death protects the claimant from the strictures of section 377.34. (*Sullivan, supra,* 15 Cal.4th at pp. 304-305.) One of the posttrial motions, defendants' motion for new trial, was appealable from the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.) And section 664 specifically provides for entry of a judgment though a motion for judgment

notwithstanding the verdict is pending, and the ruling on such a motion is separately appealable. (§ 904.1, subd. (a)(4).) Further, Maxlyn Cadlo's motion to allocate pretrial settlements pursuant to Proposition 51 was separately appealable. (See *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 997 (*Jones*).) Thus, under *Sullivan*, a valid, final judgment that was appealable could be entered prior to the resolution of these motions.[13]

Defendants argue the court abused its discretion in entering the antedated judgment for two additional reasons. First, defendants contend the record demonstrates plaintiffs were at fault for the delay in entering judgment following the verdict. A court should only enter a nunc pro tunc judgment " 'when it is apparent that the delay in rendering the judgment, or a failure to enter it after its rendition, is the result of some act or delay of the court, and is not owing to any fault of the party making the application.' " (*Williamson, supra*, 23 Cal.App.4th at p. 1415.) However, we cannot conclude on the record before us that the delay in rendering the judgment was attributable to plaintiffs. Plaintiffs submitted a proposed judgment to defendants approximately two days after the jury's verdict, and the trial court's determination that plaintiffs acted promptly under these circumstances was reasonable.

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[13] Crane relies on *Scalice v. Performance Cleaning Systems* (1996) 50 Cal.App.4th 221 for its argument that the unresolved allocation of pretrial settlements prevented entry of judgment prior to Cadlo's death. In *Scalice*, a verdict was entered for Scalice on August 4, 1995, but the parties disagreed as to how to offset certain workers' compensation benefits received by Scalice. Judgment was actually entered on September 27, but "to protect [Scalice] from events beyond his control, the [trial] court entered judgment as of" September 1, the date by which the trial court believed it would have taken to resolve the deductions issue had the court not been unavailable. (*Id*. at p. 239.) On appeal, Scalice sought interest on the judgment received from the date of *verdict*, but the Court of Appeal refused to do so, apparently because of the trial court's statement that the deductions issue could not have been resolved at that time. Scalice never argued that the date of verdict was justified on the basis that the deductions decision was separately appealable and a final, appealable judgment could have been issued at the time of verdict. The *Scalice* court never considered, much less rejected that argument, which, in a different factual context, we find controlling here.

Second, defendants argue the court abused its discretion in concluding entry of the antedated judgment was necessary "to avoid injustice." Defendants are incorrect. Granting the motion for the antedated judgment provided Maxlyn Cadlo with a windfall in the amount of the future economic damages awarded. A contrary result would have provided defendants with a windfall for the damages for Cadlo's pain and suffering prior to his death. Since the jury had concluded that defendants were at fault for Cadlo's illness, and the trial court could reasonably believe this illness killed him soon after the verdict was entered, the court did not abuse its discretion in concluding justice was better served by granting the motion.

Thus, the trial court did not abuse its discretion in determining the judgment could be entered nunc pro tunc to March 23, 2005—the day after the jury's special verdict was filed, and the day before Cadlo's death. Guided by *Williamson,* we conclude that since a valid nunc pro tunc judgment was entered prior to Cadlo's death, section 377.34 does not limit the damages awarded in the jury verdict.

3. *Maxlyn Cadlo's Motion to Vacate the Judgment and Enter an Antedated Judgment Was Proper**

Crane notes that Maxlyn Cadlo did not obtain an order appointing her as Cadlo's successor in interest (§ 377.32) until August 15, 2005. In reliance on *Pham v. Wagner Litho Machinery Co.* (1985) 172 Cal.App.3d 966, Crane argues that Maxlyn Cadlo's August 12 motion to vacate the judgment and enter an antedated judgment nunc pro tunc was unauthorized and void, and should be vacated. We disagree.

Pham is inapposite. In that case, the court held that the three-year period of time between the personal injury plaintiff's death and the appellant's substitution as the plaintiff in her place should not be included in calculating the five-year period in which an action must be brought to trial (former § 583, subd. (b)).[14] (*Pham v. Wagner Litho*

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* See footnote, *ante*, page 1.

[14] Former "[s]ection 583 was repealed by Statutes 1984, chapter 1705, section 4. The subject matter of that section is now covered by section 583.110 et seq." (*Pham v. Wagner Litho Machinery, supra,* 172 Cal.App.3d at p. 970, fn. 2.)

Machinery, supra, 172 Cal.App.3d at pp. 969-970.) The court concluded that the five-year period was tolled because the plaintiff's death left no person or entity to prosecute the underlying action on her behalf. (*Id.* at pp. 972-973.) Maxlyn Cadlo was also a plaintiff in the action with Cadlo, and there was never any question of anyone but her continuing the action on Cadlo's behalf. Moreover, by September 6, 2005, when the court granted Maxlyn Cadlo's motion, she had obtained the order appointing her as Cadlo's successor-in-interest. Thus, Crane cannot establish any prejudice.

4. *Timeliness of Motion to Vacate**

Next, Crane asserts that Maxlyn Cadlo's motion to vacate the judgment and enter an antedated judgment nunc pro tunc filed five months after Cadlo's death was an untimely motion to vacate pursuant to section 663.[15] That section provides: "A judgment . . . , when based upon . . . the special verdict of a jury, may upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: [¶] 1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts . . . . [¶] 2. A judgment . . . not consistent with or not supported by the special verdict." As Crane notes, a section 663 motion must be made either before entry of judgment; or within 15 days of mailing of notice of entry of judgment by the clerk or service by a party of written notice of entry of judgment or 180 days of entry of judgment, whichever is earliest. (§ 663a.) Crane argues that since Maxlyn Cadlo served notice of entry of

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***** See footnote, *ante*, page 1.

15 For the first time on appeal, Crane also argues that at the time of Maxlyn Cadlo's motion to vacate, Metalclad's appeal from the interim judgment had been filed, and thus the court had no power to enter or amend the judgment nunc pro tunc where the effect would be to deprive litigants of the right to "appeal in respect to the new adjudication (*Leftridge v. Sacramento* (1941) 48 Cal.App.2d 589, 594)." Crane's failure to raise this issue below constitutes a waiver on appeal. (*Estate of Westerman* (1968) 68 Cal.2d 267, 279.)

judgment on July 13, 2005, her motion to vacate the judgment had to be filed by July 28. Because it was not filed until August 12, Crane argues it was untimely.

Plaintiff responds that section 663 is inapplicable because her motion did not seek to vacate the March 25, 2005 interim judgment for the purpose of either correcting an incorrect or erroneous legal basis or conforming the judgment to the jury's special verdict. We agree that the motion was not sought under the grounds specified in section 663 and the ensuing antedated judgment did not reflect those statutory grounds. Thus, the time constraints contained in that provision do not apply.

B. *Plaintiffs' Section 998 Offers to Metalclad and Crane Were Reasonable and Made in Good Faith**

Metalclad and Crane contend plaintiffs were not entitled to expert witness fees and prejudgment interest because the statutory offer to compromise made to each of them by plaintiffs was not made in good faith and was, therefore, invalid.

In general, the prevailing party in a civil action is entitled to recover its costs. (Code of Civ. Proc., § 1032, subd. (b).) However, under Code of Civil Procedure section 998, subdivisions (c) and (d)[16] and Civil Code section 3291,[17] if a party refuses a pretrial offer and then fails to obtain a "more favorable judgment or award" at the time of trial, the party is penalized by losing the right to recover its costs; and, in addition, the party

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***** See footnote, *ante*, page 1.

16 At the time of trial section 998, subdivision (d) provided: "If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding, . . . the court . . . in its discretion, may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial . . . or during trial . . . of the case by the plaintiff, in addition to plaintiff's costs." (Stats. 2001, ch. 153, § 1.)

17 Civil Code section 3291 provides in relevant part: "If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment and interest shall accrue until the satisfaction of the judgment."

who made the offer becomes entitled to recover its own litigation costs, including expert witness fees and prejudgment interest. (*Bodell Construction Co. v. Trustees of Cal. State University* (1998) 62 Cal.App.4th 1508, 1517.) "Section 998 is intended 'to encourage settlement by providing a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer. . . .' " (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 727, quoting *Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.)

A section 998 offer to compromise must be made in good faith to be valid. (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262; *Wear v . Calderon* (1981) 121 Cal.App.3d 818, 821.) "Good faith requires that the pretrial offer of settlement be 'realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement, . . .' [Citation.] The offer 'must carry with it some reasonable prospect of acceptance. [Citation.]' [Citation.] One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees. [Citation.]" (*Jones*, at pp. 1262-1263.) "Reasonableness depends upon the information available to the parties. [Citation.]" (*Arno v. Helinet Corp.* (2005) 130 Cal.App.4th 1019, 1025 (*Arno*).)

"As a general rule, the reasonableness of a[n] . . . offer is measured, first, by determining whether the offer represents a reasonable prediction of the amount of money, if any, [the] defendant would have to pay [the] plaintiff following a trial, discounted by an appropriate factor for receipt of money by [the] plaintiff before trial, all premised upon information that was known or reasonably should have been known *to the* [*offeror*]." (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699 (*Elrod*).) "If the offer is found reasonable by the first test, it must then satisfy a second test: whether [the offeror's] information was known or reasonably should have been known to [the offeree]. . . . If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer." (*Ibid.*) When, as here, the offeror obtains a

judgment more favorable than its pretrial offer, the judgment is prima facie evidence that the offer was reasonable, and the offeree has the burden of proving otherwise. (*Id.* at p. 700; accord, *Arno, supra,* 130 Cal.App.4th at p. 1025.)

The reasonableness of a section 998 offer and whether it was made in good faith are matters within the trial court's discretion. On appeal, the trial court's discretion will be reversed only upon a showing of clear abuse resulting in a miscarriage of justice. (*Arno, supra,* 130 Cal.App.4th at p. 1025.)

1. *Section 998 Offer to Metalclad*

The personal injury and loss of consortium complaint against Metalclad was filed September 9, 2002. Metalclad filed its answer to the complaint on October 23. The declaration of plaintiffs' counsel, Christopher Andreas, establishes that on October 7, Metalclad was served with Cadlo's responses to "Standard Asbestos Case Interrogatories, Set One." Those interrogatory responses detailed Cadlo's mesothelioma condition and his exposure to asbestos while serving as a Navy machinist mate on the USS Black between 1965 and 1968. In particular, Cadlo's responses state that he was exposed to asbestos-containing products, including "cloth, fiber, gaskets, lagging, packing, pads, pipe covering and tape," and that the USS Black was dry-docked for repairs and overhaul at the LBNS. Andreas's declaration also states that Metalclad attended Cadlo's deposition on October 30, 2002, and November 5 and 6, 2003, and at "each" session Cadlo described his Navy exposure to asbestos insulation, packing and gaskets and described at least one extensive overhaul of the USS Black at the LBNS, during which he was in daily proximity to asbestos insulation removal and replacement.

On November 19, 2002, plaintiffs served Metalclad with a section 998 offer to settle the action for $149,998.00 ($99,000 to settle Cadlo's claim and $49,999 to settle Maxlyn Cadlo's claim). On December 18, Metalclad served plaintiffs with its objection to the section 998 offer, asserting the offer was not in good faith because there had not been sufficient discovery into Cadlo's medical claims and therefore Metalclad could not evaluate the reasonableness of the offer. Metalclad failed to accept the offer and the case

proceeded to trial. The jury's verdict against Metalclad exceeded plaintiffs' section 998 offer.

In granting Maxlyn Cadlo's motion for expert witness fees and prejudgment interest, the court found that Metalclad knew or should have known: Cadlo suffered from mesothelioma and had served aboard the USS Black between 1965 and 1968; the USS Black underwent at least one overhaul at the LBNS in the mid-1960's; and Cadlo was or had been aboard the USS Black and recalled substantial amounts of insulation being removed and installed during the overhaul.

Metalclad contends the court's ruling was erroneous because Metalclad had not had an opportunity to conduct discovery. Though we agree Metalclad had not *completed* discovery, it had obtained substantial information through that process, before the section 998 offer was served. Specifically, it had received the set one interrogatory answers from Cadlo and conducted a deposition of him that lasted three days. In addition, the trial court properly considered Metalclad's history of litigation in asbestos-exposure cases with Cadlo's counsel. While conceding it had been sued before by plaintiffs with mesothelioma who alleged their disease resulted from exposure to its product, Metalclad argues, "a defendant who is sued more than once for claims arising out of a single site does not necessarily know that each such case is similar." It asserts there may be differences as to the years of exposure, the manner in which the exposure is claimed to have occurred, the witnesses with percipient knowledge of the claimed exposure and the variety of other claimed exposures. Thus, it argues that without conducting discovery on each of these variables, the value of the case could not be assessed. Metalclad also asserts that at the time of plaintiffs' section 998 offer, plaintiffs had not identified any asbestos-containing product manufactured, distributed or installed by Metalclad. Further, Metalclad argues that without the opportunity to discover whether a plaintiff has proof that he or she has a particular cancer, and whether the defendant's experts agree with that diagnosis and claimed cause, a defendant cannot reasonably be expected to respond to a section 998 offer.

We disagree. Through judicial notice of its own records (Evid. Code, § 452, subd. (d)), the trial court was entitled to determine that Metalclad had previously been involved in asbestos cases with Cadlo's attorney and this prior involvement assisted Metalclad's assessment of the merits of this case. Metalclad's knowledge of its own products, whether they contained asbestos and where and how they were used, supplemented the information it had obtained from the interrogatory answers and deposition of Cadlo.

The jury verdict is prima facie evidence of the reasonableness of plaintiffs' section 998 offer (*Elrod, supra*, 195 Cal.App.3d at p. 700), and Metalclad failed to meet its burden to prove otherwise. The court did not abuse its discretion in awarding expert witness fees and prejudgment interest against Metalclad.

2. *Section 998 Offer to Crane*

Plaintiffs' original personal injury and loss of consortium complaint against Crane was filed September 9, 2002. Their second amended complaint was filed on June 6, 2003. Crane was served with process on July 8, 2003. According to Andreas's declaration, Crane was served with the aforementioned responses to standard asbestos interrogatories on July 11, 2003. Crane filed its answer to the second amended complaint on August 7, 2003.

On October 30, 2003, plaintiffs served Crane with a section 998 offer to settle the action for $112,498 ($74,999 to settle Cadlo's claim and $37,499 to settle Maxlyn Cadlo's claim). Andreas's declaration states that Crane attended Cadlo's deposition on November 5 and 6, 2003, at which Cadlo described his exposure to asbestos insulation, packing and gaskets during his Navy service, and described at least one overhaul on the USS Black at the LBNS during which he was exposed on a daily basis to asbestos insulation removal and replacement. Subsequently, Crane failed to accept plaintiffs' section 998 offer. Instead, it countered with section 998 offers in May and November 2004, offering a waiver of costs, including expert witness fees, in exchange for a dismissal with prejudice and plaintiffs' agreement to bear their own costs. The jury's verdict exceeded plaintiffs' 998 offer to Crane.

In granting Maxlyn Cadlo's motion for expert witness fees and prejudgment interest, the court found that Crane knew or should have known prior to receiving the section 998 offer that Cadlo had served in the Navy aboard the USS Black as a machinist mate involved in the handling of asbestos packing and had been diagnosed with mesothelioma. As a result of its prior litigation history, Crane also knew of its involvement as a supplier of asbestos packing during the relevant time period and that its product was used in engine rooms aboard Navy ships such as the USS Black. The court concluded that based on this knowledge, Crane had substantial knowledge of potential exposure in this action and offered no amount except a waiver of costs in exchange for a dismissal.

Crane argues that it was not until it received a response to its December 2003[18] summary judgment motion, that plaintiffs identified a witness who recalled Crane products on board the USS Black. Crane argues because at the time of the October 2003 section 998 offer and until it expired, Crane had no information that any of its asbestos-containing products were on board the USS Black at the time of Cadlo's alleged exposure thereto. Moreover, Crane argues that at the time of the section 998 offer, it had just been brought into the case and did not have the opportunity to depose Cadlo. It asserts that in any case, at his November 2003 deposition, Cadlo could not recall encountering any Crane products on the USS Black. Thus, Crane argues, plaintiffs had no realistic expectation their "sizable" settlement demand would be accepted and their section 998 offer was not made in good faith.

As we noted previously, the verdict is prima facie evidence of the reasonableness of plaintiffs' section 998 offer. (*Elrod*, *supra*, 195 Cal.App.3d at p. 700.) More than three months before being served with the section 998 offer, Crane was served with Cadlo's standard interrogatory responses that detailed his mesothelioma condition and his exposure to asbestos while serving as a Navy machinist mate on the USS Black between 1965 and 1968. In particular, Cadlo's responses state that he was exposed to asbestos-

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18 Crane erroneously states its summary judgment motion was filed in December *2005*.

containing products, including "cloth, fiber, gaskets, lagging, packing, pads, pipe covering and tape," and that the USS Black was dry-docked for repairs and overhaul at the LBNS. In addition, Crane attended Cadlo's deposition within a week of receiving plaintiffs' section 998 offer, while the offer remained open.[19] Despite Crane's claims to the contrary, in addition to Cadlo's interrogatory responses and his deposition testimony, its prior involvement in many asbestos-related actions, and its knowledge that its asbestos products were used in engine rooms aboard Navy ships such as the USS Black during the relevant time period aided Crane in evaluating the merits of the case and plaintiffs' section 998 offer. The trial court could reasonably conclude that Crane's knowledge of its products and where and when they were used, as well as its knowledge of asbestos-related cancer would be useful in assessing plaintiffs' claim of personal injury due to its asbestos-containing products.

Consequently, Crane failed to meet its burden of overcoming the presumption of reasonableness of plaintiffs' section 998 offer. The court did not abuse its discretion in awarding expert witness fees and prejudgment interest.

II. ISSUES UNIQUE TO METALCLAD'S APPEAL (A111353)*

A. *There Is Substantial Evidence of Exposure to Metalclad's Product*

Metalclad contends there was insufficient evidence of Cadlo's exposure to its asbestos product while on board the USS Black.

"[W]hen a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) We must view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*SFPP v. Burlington Northern & Santa Fe Ry. Co.*

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[19] Crane cites no authority requiring that an offeree have sufficient information on the date the section 998 offer is served.

* See footnote, *ante*, page 1.

(2004) 121 Cal.App.4th 452, 462.) The testimony of a single witness may constitute substantial evidence in support of the judgment. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

"A threshold issue in asbestos litigation is exposure to the defendant's product. The plaintiff bears the burden of proof on this issue. [Citations.] If there has been no exposure, there is no causation. [Citation.] Plaintiffs may prove causation in an asbestos case by demonstrating that the plaintiff's or decedent's exposure to the defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer. [Citation.]" (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1103.)

"Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to the plaintiff. [Citation.] The plaintiff, accordingly, cannot prevail against a defendant without evidence that the plaintiff [or decedent] was exposed to asbestos-containing materials manufactured or furnished by the defendant with enough frequency and regularity to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries. [Citations.]" (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1438.) Circumstantial evidence may be sufficient to establish a reasonable inference of exposure. (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1420.)

We conclude sufficient circumstantial evidence was presented to support a reasonable inference of Cadlo's exposure to Metalclad's asbestos product. Though plaintiffs presented no evidence as to how much insulation was used at the LBNS or how much was supplied by Metalclad, plaintiffs' evidence established that: (1) during the period Cadlo served on board the USS Black, Metalclad supplied large amounts of Kaylo insulation to the LBNS and (2) for two and one-half months during that period, while the USS Black was at the LBNS, Kaylo insulation was installed on the ship. From this evidence it is reasonable to infer that the Kaylo insulation supplied by Metalclad was

installed on the USS Black in Cadlo's presence. Consequently, we reject Metalclad's claim of error.

B. *Admitting and then Striking Ay's Testimony Did Not Improperly Influence the Jury*

Prior to trial, the court denied Metalclad's request for an in limine ruling precluding Ay from giving opinion testimony that it was more likely than not that Metalclad's asbestos insulation product was on the USS Black. During direct examination, over Metalclad's objection, Ay so testified, and he reiterated that opinion on redirect examination. Thereafter, Metalclad again moved to strike this opinion testimony, arguing there was no foundation for it. Prior to instructing the jury, the court granted the motion to strike and admitted it had erred in denying Metalclad's objections to Ay's opinion. The court then admonished the jury that Ay's "more likely than not" opinion testimony was stricken and they were to disregard it. The jury was also admonished to give Ay's testimony "to certain facts based upon his observations during the relevant period of time" the weight the jury deemed appropriate.

Metalclad argues that despite the court's later ruling, it erred by initially permitting Ay to twice give the challenged opinion testimony, and the court's admonition to the jury failed to cure the resulting harm: "The verdict against Metalclad, despite the lack of evidence that Metalclad's materials were on the USS Black, is clear evidence that the trial court's error could not be cured by the jury admonition, and the jury remained improperly influenced by . . . Ay's inadmissible testimony."

We reject Metalclad's premise that Ay's opinion constituted the only evidence that its products were on the USS Black. As discussed in part II.A., *ante*, Ay's testimony regarding the quantity of asbestos-laden insulation delivered by Metalclad and installed on ships at the LBNS provides substantial evidence that Cadlo was exposed to Metalclad's product. Having rejected Metalclad's premise, we also reject its conclusion that the court's admonition failed to cure its error in originally admitting the evidence. (See *People v. Houston* (2005) 130 Cal.App.4th 279, 312 [jurors are presumed to follow the trial court's instructions and admonitions].)

III. ISSUES UNIQUE TO CRANE'S APPEAL (A112002)*

A. *Substantial Factor Instructions*

Crane contends the court erred in refusing to instruct the jury that a " 'remote or trivial' contribution to [Cadlo's] cumulative dose of asbestos could not support a finding of causation."

" 'A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence.' [Citation.] The judgment may not be reversed on the basis of instructional error unless the error caused a miscarriage of justice. [Citation.] 'When the error is one of state law only, it generally does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. [Citation.]' [Citation.] ' " 'A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented. [Citation.]' [Citations.]" ' [Citation.]" (*Fields v. Yusuf* (2006) 144 Cal.App.4th 1381, 1388.)

The trial court refused Crane's proposed special instruction No. 4 which provided: "A substantial factor is something which is more than a slight, trivial, negligible, or theoretical factor in producing a particular result." It also refused to instruct the jury pursuant to CACI No. 430 (Jan. 2005 ed.): "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm."

However, the court did instruct the jury pursuant to BAJI Nos. 3.76 and 3.78:[20] "The law defines cause in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or

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* See footnote, *ante*, page 1.

[20] The court also instructed on concurrent causation pursuant to BAJI No. 3.77.

harm. [¶] . . . [¶] An exposure to a defendant's product or products was a substantial factor in producing [Cadlo's] illness if plaintiffs establish by a preponderance of the evidence that in reasonable medical probability, this exposure was a substantial factor contributing to [Cadlo's] risk of developing the disease."

"*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 (*Rutherford*) sets forth the controlling standard for proving causation in an asbestos-induced personal injury case." (*Jones, supra,* 132 Cal.App.4th at p. 997.) In *Rutherford,* our Supreme Court noted that the substantial factor standard of causation subsumed the "but for" standard, and reached beyond it to address situations such as those involving independent or concurrent causes. (*Rutherford*, at p. 969.) It also noted that the term "substantial factor" has not been judicially defined with specificity.[21] While the court recognized that "a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about an injury, damage, or loss is not a substantial factor," it stated that it was " 'neither possible nor desirable to reduce [the term substantial factor] to any lower terms,' " and cautioned that the term " 'substantial' " should not be given undue influence. (*Ibid.*)

The *Rutherford* court explained, "Plaintiffs cannot be expected to prove the scientifically unknown details of carcinogenesis, or trace the unknowable path of a given asbestos fiber. . . . [W]e can bridge this gap in the humanly unknowable by holding that plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested, and hence to the *risk* of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that *actually* produced the malignant growth." (*Rutherford, supra,* 16 Cal.4th at pp. 976-977, fn. omitted.)

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21 Similarly, the Comment to BAJI 3.76 (Jan. 2005 ed.) states that the Committee on California Civil Jury Instructions has not attempted to define the word "substantial." (At p. 100.)

Rutherford concluded: "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold exposure to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a substantial factor in bringing about the injury. In an asbestos-related cancer case, the plaintiff need not prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's risk of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation (BAJI Nos. 3.76 & 3.77)**[22]** remain correct in this context and should also be given." (*Rutherford, supra,* 16 Cal.4th at pp. 982-983, fns. and italics omitted.)

Despite the controlling precedent on causation stated in *Rutherford*, Crane argues that our Supreme Court's decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 endorses the "but for" causation standard of CACI No. 430 in concurrent causation cases such as this. In *Viner*, a transactional legal malpractice case, our Supreme Court held the "but for" causation instruction was proper. However, as the appellate court concluded in *Jones, supra,* 132 Cal.App.4th at p. 998, fn. 3, *Viner* is inapposite. Nothing in *Viner* suggests that the court intended to supplant the specific instructions on asbestos causation approved in *Rutherford*. Moreover, like *Rutherford*, *Viner* noted that the substantial factor causation standard subsumes the "but for" standard. (*Viner,* at p. 1240.)

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22 At the time of the *Rutherford* decision, BAJI had not yet formulated a specific instruction regarding asbestos causation. In 2002, in response to *Rutherford*, BAJI formulated the asbestos causation instruction in BAJI No. 3.78. (BAJI (Spring 2007 ed.) Appendix E, BAJI Master List, p. 1223.)

The jury in this case was instructed pursuant to the language approved in *Rutherford* for asbestos-related cases. Consequently, Crane has failed to demonstrate instructional error.

B. *Loss of Consortium Instruction*

Next, Crane contends the court erroneously refused to instruct on loss of consortium with the following modified version of BAJI No. 14.40: "If you find that . . . Cadlo is entitled to a verdict against the defendant, and if you find that the act or omission upon which you base your finding of liability has caused . . . Maxlyn Cadlo to have suffered or will be reasonably certain to suffer in the future any of the following losses: [¶] 1. Any loss of [Cadlo's] love, companionship, comfort, affection, society, solace, or moral support; or [¶] 2. Any loss of [Cadlo's] physical assistance in the operation and maintenance of the home, you shall award to her reasonable compensation for any of such losses as may be established by the evidence. [¶] *If you find that . . . Maxlyn Cadlo is entitled to compensation for loss of consortium as described above, you shall not include in such award any damages for future loss of consortium which occurs after . . . Cadlo's anticipated date of death in March 2006 as such damages are not recoverable in this action.* [¶] If you find that . . . Maxlyn Cadlo is entitled to compensation for any loss of consortium as described above, you will not include in such award any compensation for losses that . . . Cadlo may be entitled to recover. That is, you will not award . . . Maxlyn Cadlo any compensation for loss of her right to financial support from [Cadlo] as that is included in . . . Cadlo right to recover for loss of direct earning capacity. Neither will you include in any award to . . . Maxlyn Cadlo any compensation for her personal services to [Cadlo], such as nursing, as that, too, is included in . . . Cadlo right of recovery. You shall not award to Maxlyn Cadlo any compensation for . . . Cadlo loss of the benefit of his own past and future physical assistance in the operation and maintenance of the home, as that, too, is included in his

right of recovery." (Italics added.)[23] Instead, the court instructed with an unmodified BAJI No. 14.40 instruction which omitted the italicized portion of Crane's proposed instruction.[24]

The court also instructed the jury pursuant to BAJI No. 14.60: "You are not permitted to award a party speculative damages, which means compensation for future loss or harm which although possible is conjectural or not reasonably certain. However, if you determine that a party is entitled to recover, you shall compensate a party for loss or harm caused by the injury in question, which is reasonably certain to be suffered in the future."

Crane argues that the loss of consortium damages awarded pursuant to the standard BAJI No. 14.40 instruction amount to a "double recovery" that overlaps with damages potentially recoverable in a separate wrongful death action filed by Maxlyn Cadlo in June 2005. Crane's argument is speculative and premature.

A similar argument was rejected in *Jones*. In that case, the court upheld the trial court's refusal to allocate any portion of prior settlements of personal injury claims to a "potential wrongful death action." (*Jones, supra,* 132 Cal.App.4th at p. 1008.) *Jones* quoted the trial court: " 'The Court will not speculate on the issue regarding what is appropriate [to allocate to a potential wrongful death claim] because the record before this Court provides no basis for such a decision. . . . Any breakdown from wrongful death will have to be resolved by another tribunal with sufficient evidence for such a decision.' " (*Ibid.*)

For the same reasons stated in *Jones*, the trial court here properly determined that instructing the jury in order to eliminate a *potential* double loss of consortium recovery to

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[23] The standard BAJI No. 14.40 instruction given also included "any loss of enjoyment of sexual relations or ability to have children" by Maxlyn Cadlo as a basis for loss of consortium damages.

[24] At the time the jury was instructed with the standard BAJI No. 14.40 instruction, no wrongful death action had been filed by Maxlyn Cadlo. That Maxlyn Cadlo in fact filed a wrongful death action about 10 weeks after the jury issued its special verdict is irrelevant for purposes of reviewing Crane's claim of instructional error.

Maxlyn Cadlo in a *potential* wrongful death claim was speculative and therefore unwarranted. Consequently, no instructional error is shown.[25]

C. *Pretrial Settlement Allocation Formula*

Pursuant to Proposition 51, a tort defendant has no joint liability for noneconomic damages. It is liable only for the portion of the plaintiffs' noneconomic damages corresponding to its percentage of fault. (*Jones, supra,* 132 Cal.App.4th at p. 1006; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 99, p. 190.) Thus, where a defendant settles with a plaintiff, a nonsettling defendant who sustains a money judgment is entitled to a setoff for the portion of the settlement attributable to economic damages, and is severally responsible for his share of the noneconomic damages. (*Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 276-277.)

Crane contends the court erred in applying the formula for allocating pretrial settlements approved in *Jones, supra,* 132 Cal.App.4th 990. Crane appears to take issue with that part of the *Jones* pretrial settlement credit formula that determined the percent of damages awarded by the jury for personal injury and the percent awarded for loss of consortium by dividing the damages awarded for loss of consortium by the total damages awarded. Crane asserts that, here, pursuant to the *Jones* formula, the trial court ruled that 35 percent[26] of the pretrial settlement should be allocated to Maxlyn Cadlo's loss of consortium claim, and, without analysis, argues "[t]he effect of that decision was to make unavailable for settlement credit a total of $517,444 in settlements", and "a loss of credit against economic damages of $152,646." Crane's conclusory claim fails to demonstrate why the *Jones* formula and the court's pretrial settlement allocation were erroneous. Consequently, no abuse of discretion is shown.

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25 Because we conclude the jury was properly instructed, we reject Crane's related argument that had the jury been instructed to calculate Maxlyn Cadlo's loss of consortium damages up to the time of Cadlo's anticipated date of death, the allocation of credit for pretrial settlement to Maxlyn Cadlo's loss of consortium claim would have been different.

26 Here, the trial court's formula actually utilized a figure of 34.5 percent.

D. *Substantial Evidence Supports the Economic Damages Award*

Crane contends that even if Cadlo's claims for noneconomic and future economic damages were not abated by his death prior entry of judgment, under section 657, subdivisions (1), (2), (5) and (6) a new trial is warranted because the economic damages awarded are excessive, unsupported by substantial evidence and the result of irregularities in the proceedings and jury misconduct.

1. *Nonmedical Economic Damages*

Crane argues that the jury's award of $1,335,600 as future nonmedical economic damages was based on a "factually unsupported assumption" that Cadlo would have lived another 20 years and continued to receive income and benefit from his own household services, but for his mesothelioma.[27] We disagree.

Economist Ben-Zion testified that the official source for estimating life expectancy is the National Center for Health Statistics, which compiles a mortality rate and mortality table, which Ben-Zion relied on in concluding Cadlo had a 20-year life expectancy. Pulmonary physician Frank Ganzhorn testified that he could not conclude that absent his mesothelioma, Cadlo, a smoker, would die from cigarette smoking by age 70, but he could conclude Cadlo would die prematurely due to mesothelioma. Moreover, in closing argument Crane's counsel pointed out the mortality table depicting the 20-year life expectancy of a 60-year-old and stated, "This figure is not conclusive. . . . [¶] [It] may be considered by you in connection with other evidence relating to the probable life expectancy of . . . Cadlo . . . ."

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[27] In response, Maxlyn Cadlo argues that Crane has waived this claim by asserting elsewhere in its brief, "Based on the expert testimony of Drs. Ben-Zion and Ganzhorn, the jury was entitled to conclude that, but for [Cadlo's] contraction of cancer, [Maxlyn Cadlo] would have continued her marital relationship with him for another 20 years." (See *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152 [briefs are reliable indications of party's position on facts and law and reviewing court may rely on such statements as admissions against the party].) Despite our agreement with Maxlyn Cadlo, we review the contention on the merits.

Ben-Zion testified that absent Cadlo's mesothelioma, he would continue to provide home services until age 77. Ben-Zion said he assumed that once a person reaches age 78 he or she longer contributes to household services, and based this assumption on a study done of the average male as well as an additional assumption that Cadlo performed an average amount of household services. Ben-Zion testified the jury would arrive at a determination of the amount of household services Cadlo performed and economic damages for Cadlo's lost household services based on all the evidence presented. Cadlo testified that prior to his illness he was responsible for maintaining his yard and repairing and maintaining his home.

Contrary to Crane's assertion, substantial evidence supports the 20-year life expectancy finding and the jury's rejection of the claim that Cadlo's cigarette smoking reduced his life expectancy. In addition, Cadlo and Ben-Zion's testimony provides substantial evidence in support of the jury's damages award for past and future lost household services.

2. *Future Medical Damages*

Crane also argues that the evidence offered by plaintiffs on the issue of Cadlo's future medical expenses was "speculative."

Ganzhorn opined that the $87,305 in Cadlo's medical bills up to the time of trial was a "reasonable amount," and estimated that Cadlo would live one to two more years. Ganzhorn also opined that if Cadlo required a low level of future medical care, such care would cost approximately $20,000 if he lived one year, and $40,000 if he lived two years. However, if Cadlo required more intensive care from a skilled nursing facility or intensive care unit and lived two years, his future medical expenses could cost $184,000. Ganzhorn said that this higher level of care was not inconceivable for a person with terminal cancer.

The jury was properly instructed that economic damages included the reasonable value of medical, hospital and nursing care services and supplies reasonably required and actually given in the treatment of Cadlo to the present time and the present cash value of the reasonable value of similar items reasonably certain to be required and given in the

future. Based on Ganzhorn's testimony, the jury could conclude that a person suffering from terminal cancer might reasonably require a more intensive and costly level of care in the future. Contrary to Crane's assertion, the award for future medical expenses was not unsupported by the evidence.

DISPOSITION

The judgment is affirmed. Maxlyn Cadlo is awarded costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

Superior Court of San Francisco City and County, No. CGC-02-412325, John J. Conway, Judge

Brayton Purcell, Alan R. Brayton, Lloyd F. LeRoy and David Collins for Plaintiff and Respondent.

McKenna Long & Aldridge, Lisa L. Oberg, Camille K. Fong and Mabi H. Ellis for Defendant and Appellant Metalclad Insulation Corporation.

Hassard Bonnington, Philip S. Ward, John P. Katerndahl and Richard G. Katerndahl for Defendant and Appellant John Crane Inc.